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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DAVID ALAN DETRICK, Appellant.	2 CA-CR 2007-0310 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20071013

Honorable Michael J. Cruikshank, Judge

AFFIRMED

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B R A M M E R, Judge.

¶1 Appellant David Alan Detrick appeals his conviction and sentence for disorderly conduct. He asserts the trial court erroneously instructed the jury on the elements of aggravated assault and disorderly conduct, self-defense, and reasonable doubt. He also contends the trial court erred in denying his motion for judgment of acquittal on the aggravated assault charges of which he was not convicted and abused its discretion in imposing a partially, rather than substantially, mitigated sentence. Finding no error, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdict. *See State v. Hamblin*, 217 Ariz. 481, ¶ 2, 176 P.3d 49, 50 (App. 2008). On May 15, 2006, Detrick and his roommate, M., went to a party at the home of two mutual friends. Detrick brought with him a thirty-two-inch sword. While at their friends' house, Detrick and M. began arguing. As the argument became heated, Detrick, who had been sitting in a chair sharpening the sword, raised his sword at M. M. charged and tackled Detrick. The two struggled on the floor for several seconds before friends separated them. As a result of the struggle, M. suffered four severe lacerations requiring three days of medical treatment in a hospital.

¶3 A grand jury charged Detrick with aggravated assault causing temporary but substantial disfigurement and aggravated assault with a deadly weapon or dangerous instrument, both acts of domestic violence. After a three-day trial, the jury failed to reach

a verdict on the aggravated assault charges, but found Detrick guilty of the lesser-included offense of disorderly conduct involving a deadly weapon. The jury found the offense was an act of domestic violence and, for purposes of sentence enhancement, that it was of a dangerous nature. Finding as a mitigating factor "the substantial role the victim had in the infliction of his own injuries," the trial court sentenced Detrick to a partially mitigated, two-year prison term. This appeal followed.

Discussion

Exclusive control instruction

¶4 Detrick first contends the trial court erred in failing to instruct the jury that the crimes of aggravated assault with a deadly weapon, A.R.S. § 13-1204(A)(2), and disorderly conduct involving a deadly weapon, A.R.S. § 13-2904(A)(6), require that the perpetrator exclusively control the weapon. We review de novo whether jury instructions correctly state the law. *State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997); *State v. Lopez*, 209 Ariz. 58, ¶ 10, 97 P.3d 883, 885 (App. 2004). Because Detrick failed to object to the instructions on this basis below, we review this claim only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to [the] defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Id.* ¶ 19, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980,

982 (1984). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

¶5 Detrick asserts the court's aggravated assault instruction prejudiced him because it violated his "inherent right not to be wrongly convicted when actually innocent." As noted above, Detrick was not convicted of aggravated assault. To prevail on fundamental error review, a defendant must show any error was fundamental and that it actually prejudiced him, not simply that it had exposed him to the possibility of prejudice. *See Id.* Detrick, therefore, has failed to show how the aggravated assault instruction, even if fundamental error, prejudiced him.

¶6 Detrick, nonetheless, contends the trial court also erred in instructing the jury on disorderly conduct. Pursuant to § 13-2904(A)(6), "[a] person commits disorderly conduct if, with intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, such person . . . [r]ecklessly handles, displays or discharges a deadly weapon or dangerous instrument." Detrick reasons that, because the statute's text refers to "[a] person" handling, displaying or discharging a weapon, the offense of disorderly conduct requires that the perpetrator have exclusive control of the weapon. § 13-2904(A)(6). But Detrick fails to develop this argument further and cites no caselaw or other authority supporting his interpretation of § 13-2904(A)(6). *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Burdick*, 211 Ariz. 583, n.4, 125 P.3d 1039, 1042 n.4 (App. 2005) (defendant waived argument where failed to develop it as required by Rule 31.13(c)(1)(vi)). Moreover, we find

no authority supporting Detrick's position but, rather, find authority to the contrary. *See State v. Angle*, 149 Ariz. 499, 507-09, 720 P.2d 100, 108-10 (App. 1985) (Kleinschmidt, J., dissenting) (evidence supported disorderly conduct under § 13-2904(A)(6) when man struggled with wife over gun), *dissenting opinion adopted by State v. Angle*, 149 Ariz. 478, 720 P.2d 79 (1986); *cf. State v. Griffith*, 179 Ariz. 417, 418, 880 P.2d 637, 638 (App. 1993) (for sentence enhancement purposes, defendant "used" gun although never exclusively controlling it during struggle with police officer over its control). Therefore, we do not address this argument further.

Self-defense instruction

¶7 Detrick next asserts the trial court erroneously instructed the jury on self-defense. As we previously noted, we review de novo whether jury instructions correctly state the law. *Orendain*, 188 Ariz. at 56, 932 P.2d at 1327; *Lopez*, 209 Ariz. 58, ¶ 10, 97 P.3d at 885. We view the jury instructions given here in their entirety to determine if they adequately reflected the law. *See State v. Gallegos*, 178 Ariz. 1, 10, 870 P.2d 1097, 1106 (1994). "We will reverse only if the instructions, taken together, would have misled the jurors." *State v. Doerr*, 193 Ariz. 56, ¶ 35, 969 P.2d 1168, 1179 (1998). And, because Detrick did not object to the court's self-defense instructions below, he has forfeited appellate review for all but fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

¶8 "If evidence of [self-defense] is presented by the defendant, the state must prove beyond a reasonable doubt that the defendant did not act with justification." A.R.S.

§ 13-205(A). A person may, in self-defense, use or threaten deadly physical force against another "[w]hen and to the degree a reasonable person would believe that deadly physical force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly physical force." A.R.S. § 13-405(A)(2).

¶9 At trial, Detrick argued that he was acting in self-defense throughout the altercation with M. because, he testified, M. had initiated the argument; M. had told Detrick to "go outside" so M. could "deal with [him]"; Detrick had been "in fear for [his] life" because he knew M. carried a knife and had a violent history; and M. had "charged" Detrick while he was holding the sword. The trial court instructed the jury regarding self-defense as follows:

> A person is justified in using or threatening physical force in self-defense if the following two conditions existed: One, a reasonable person would have believed that physical force was immediately necessary to protect against[] another's use or attempted use of unlawful physical force; and two, the defendant used or threatened no more physical force than would have appeared necessary to a reasonable person. However, a person may use deadly physical force in self-defense only to protect against another's use or threatened use of deadly physical force.
>
> Self-defense justifies the use or threat of physical force only while the apparent danger continues. The right to use physical force in self-defense ends when the apparent danger ends.
>
> The standard for determining whether the defendant is entitled to the defense of self-defense is whether a reasonable person would believe that physical force was immediately necessary to protect against another's use or attempted use of unlawful physical force. That the defendant's belief was honest

> is immaterial. You must measure the defendant's belief against what a reasonable person would believe.
>
> The threat or use of physical force against another is not justified if a person provoked the other's use or attempted use of unlawful physical force. The threat or use of physical force against another is not justified in response to a verbal provocation alone.
>
> A person is justified in threatening or using both physical force and deadly physical force against another if and to the extent the person reasonably believed that the physical force or deadly physical force is immediately necessary to prevent the other person's use of imminent deadly force.

¶10 Detrick compares this instruction to the one our supreme court found misleading in *State v. Grannis*, 183 Ariz. 52, 60-61, 900 P.2d 1, 9-10 (1995). We find *Grannis* distinguishable. Although in *Grannis* the instruction the trial court gave closely mirrored the first paragraph of the trial court's instruction here, the *Grannis* instruction concluded with the statement, "A defendant may only use deadly physical force in self-defense to protect himself from another's use or attempted use of deadly physical force." 183 Ariz. at 61, 900 P.2d at 10. Our supreme court found the trial court had erred in giving this instruction because, by concluding with that statement, the jury could have interpreted the statement "as a limitation on the entire instruction," leading the jury to wrongly "believe that actual deadly force rather than reasonably apparent deadly force was necessary to justify deadly force in response." *Id.* It further noted that, despite the fact the jury had been properly instructed regarding non-deadly physical force pursuant to A.R.S. § 13-404, it "could not adequately consider [self-

defense] without being properly instructed as to the correct standard set forth in § 13-405" regarding the use of deadly physical force. *Id*.

¶11 Although the instruction the trial court gave here includes similar language to that the court in *Grannis* had used, the instructions given here clarified that language by concluding, "A person is justified in threatening or using both physical force and deadly physical force against another if and to the extent the person reasonably believed that the physical force or deadly physical force is immediately necessary to prevent the other person's use of imminent deadly force." This instruction tracks the language of both § 13-404 and § 13-405, which the instruction in *Grannis* did not. Thus, not only did the court's instruction here include a correct statement of the law concerning the use of deadly physical force, it also concluded with that statement, clarifying any potential confusion arising from the preceding instructions. *See Grannis,* 183 Ariz. at 61, 900 P.2d at 10. Because we conclude the instructions the court gave, taken as a whole, correctly stated the law, we find no error, fundamental or otherwise. *See Doerr*, 193 Ariz. 56, ¶ 35, 969 P.2d at 1177; *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607.

Motion for judgment of acquittal

¶12 Detrick argues the trial court erred in denying his motion for judgment of acquittal on the aggravated assault charges because the evidence showed that "[M.] had been the aggressor throughout the attack" and "no substantial evidence was ever presented that the wounds suffered by [M.] were actually caused by [Detrick]." *See* Ariz. R. Crim. P. 20. But,

because Detrick was not convicted of those offenses, that issue is moot. *See Henderson*, 210 Ariz. 561, n.2, 115 P.3d at 605 n.2 (reviewing court generally does not address moot issues). Nonetheless, relying on *State v. Mathers*, 165 Ariz. 64, 796 P.2d 866 (1990), Detrick contends that "[a]lthough the jury ultimately found [him] guilty of a lesser included offense, . . . said finding of guilt does not preclude reversal of the trial court's denial of [his] Rule 20 motion" on the greater charges. Detrick's reliance on *Mathers* is misplaced, because in *Mathers* the court merely noted that "[t]he fact that a jury convicts a defendant [of an offense] does not itself negate the validity of the earlier motion for acquittal" of that charge. 165 Ariz. at 67, 796 P.2d at 869. Because Detrick does not appeal the denial of a motion for acquittal of a charge of which he was convicted, *Mathers* is inapposite.

¶13 To the extent Detrick believes that, if his Rule 20 motion on the original charges had been granted, the trial court could not have instructed the jury on lesser included offenses, he is mistaken. *See State ex rel. Thomas v. Duncan*, 216 Ariz. 260, n.7, 165 P.3d 238, 243 n.7 (App. 2007) (noting that, even if judgment of acquittal granted on charged offense, "the lesser included offense would still be applicable"). Detrick does not contend there was insufficient evidence to support his disorderly conduct conviction. Accordingly, we do not address this issue further.

¶14 In a footnote in his opening brief on appeal Detrick asserts, "the finding as to dangerous nature was improper as well" because he did not have exclusive control of the sword when M. was injured. But our rules require that arguments appear in the "body" of a

brief. *State v. Miller*, 186 Ariz. 314, 323, 921 P.2d 1151, 1160 (1996) (argument waived because made in footnote); *see* Ariz. R. Crim. P. 31.13(c). Moreover, Detrick failed to develop this argument in any meaningful way or cite any supporting authority. *See Burdick*, 211 Ariz. 583, n.4, 125 P.3d at 1042 n.4. At any rate, a finding that the offense was of a dangerous nature because the defendant "use[d] . . . a deadly weapon" during the offense, A.R.S. § 13-604(F), does not require that the defendant exclusively control the weapon. *See Griffith*, 179 Ariz. at 418, 880 P.2d at 638.

Portillo instruction

¶15 Detrick argues the reasonable doubt instruction the trial court gave pursuant to *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995), "violated [his] federal due process rights" by "lower[ing] the reasonable doubt standard in Arizona to the clear and convincing evidence standard." Our supreme court repeatedly has rejected similar challenges to the instruction the court in *Portillo* directed trial courts to give. *See, e.g., State v. Garza*, 216 Ariz. 56, ¶ 45, 163 P.3d 1006, 1016-17 (2007); *State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916 (2006); *State v. Roseberry*, 210 Ariz. 360, ¶ 55, 111 P.3d 402, 411-12 (2005); *State v. Dann*, 205 Ariz. 557, ¶ 74, 74 P.3d 231, 249-50 (2003); *State v. Lamar*, 205 Ariz. 431, ¶ 49, 72 P.3d 831, 841 (2003); *State v. Van Adams*, 194 Ariz. 408, ¶¶ 29-30, 984 P.2d 16, 25-26 (1999). We are bound to follow our supreme court's decisions. *See State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003). Detrick, in fact, concedes "*Portillo* is the

law in Arizona" and notes he "merely raised the issue to preserve [it] for a possible federal appeal." We, therefore, do not address this argument further.

Mitigated sentence

¶16 Last, Detrick contends the trial court abused its discretion by imposing a partially, rather than substantially, mitigated sentence. We will not disturb a sentence that is within statutory limits, as is Detrick's, unless it clearly appears the court abused its discretion. *See State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003); *see also* § 13-604(F). We will find an abuse of sentencing discretion only if the court acted arbitrarily or capriciously or failed adequately to investigate the facts relevant to sentencing. *Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d at 357. Provided the court fully considers the factors relevant to imposing sentence, we generally will find no abuse of discretion, and the weight given by the trial court to any factor asserted in mitigation rests within the court's sound discretion. *See id.*

¶17 Detrick asserts the trial court "failed to properly investigate [his] background or consider other compelling mitigation," specifically his "mental or emotional disability and background of being abused," his remorse, and his "strong family support." The record, however, indicates otherwise. The presentence report set forth his history, including his emotional difficulties resulting from childhood exposure to domestic violence, physical abuse at the hands of his father, and removal from his parents' custody. Detrick's mother submitted a letter in his support. At the sentencing hearing, the trial court noted it had "read the presentence report[,] . . . read a prior presentence report[,] . . . seen a number of juvenile

additional reports pertaining to [when Detrick was] a juvenile[, and] read a letter from [Detrick's] mother." The court also considered Detrick's statements at the hearing expressing his regret and resolve to "take responsibility for [his] life and [his] actions and make a positive contribution . . . to society." Because the court gave due consideration to the evidence presented at sentencing, we cannot say it abused its discretion by imposing a partially, rather than substantially, mitigated prison term. *See id.* ¶ 8 ("[A] sentencing court is not required to find that mitigating circumstances exist merely because mitigating evidence is presented; the court is only required to give the evidence due consideration.").

Disposition

¶18 For the foregoing reasons, we affirm Detrick's conviction and sentence.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge